No. 81-2296

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE, *et al.*,

Petitioners,

—against—

NORTH AMERICAN SOCCER LEAGUE, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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October Term, 1981

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—against—

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Respondents.

PETITIONERS' REPLY BRIEF

The National Football League and those of its component teams named as parties to this action (collectively, the "NFL") submit this Reply Brief in accordance with this Court's Rules 22.5 and 22.6.

Respondents in this action are the North American Soccer League and certain of its component teams (collectively, the "NASL"), a number of which are or until recently were owned by such giant American and Canadian corporations as Thomas J. Lipton, Inc., Warner Communications, Inc., Gulf & Western Industries, Inc. (Madison Square Garden), Molson Breweries, Louisiana Pacific Corporation, Bayly Corporation and Global Communications, Ltd.[1] These enormous enterprises claim that their soccer venture is unable to compete "successfully" against the rival NFL unless the football league permits the con-

[1] Brief for Respondents in Opposition (hereinafter "Opp.") at 16a. The NFL, in contrast, permits controlling ownership only by individuals or organizations not principally engaged in a business other than NFL football.

tinuation of interlocking management groups and cross-ownership between itself and its competitors.

The NFL submits this Reply Brief in order to reply to certain arguments first raised by the NASL in its Brief in Opposition and to note the significance of a decision which this Court handed down after the NFL's Petition was filed.

I.

The Court of Appeals' Confusion Over What Is "Anticompetitive" Is Likely to Cause Precedential Mischief.

The NFL and the NASL both are joint ventures composed of separate economic entities. The same can be said of any joint venture. But once legitimate ventures such as professional sports leagues are formed, they compete as distinct economic enterprises with each other and with all other forms of paid entertainment. The preservation of competition among these enterprises depends in large part upon ensuring that the competing leagues maintain a healthy distance from one another. The decision below, however, stands for a contrary proposition.

The Court of Appeals, together with the NASL, labelled the NFL's desire to compete as a league against similar sports leagues—including the NASL, with its rich corporate support—as "anticompetitive." The NASL points to this statement [2] as a principal support for its argument that the decision below is not a deviation from governing antitrust authority.

But the trial court, which first used this word, put it in a very different context:

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[2] Opp. at 6.

> "The distinction lies between competition and competitors. . . . Economic conduct may damage competitors. Indeed, it may be specifically designed to do so. There is nothing illegal in that. Competitors compete.
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> * * *
>
> "The anticompetitive intent of the cross-ownership ban is *not an illegal intent*, because the NFL, which competes against other professional sports leagues as a single economic entity, seeks to promulgate the ban in furtherance of that entity's marketplace efficiency. The ban is an exercise in entity housekeeping. . . ." [3]

The proper distinction, as this Court has held,[4] is between the legitimate *anticompetitor* intent with which all economic "persons" are encouraged to enter the marketplace and the anticompetitive intentions with which separate economic actors join forces unlawfully to impede the normal processes of competition. The Court of Appeals confused these two ideas and thus arrived at a perverse result.

II.

This Court's Decision in *Arizona* v. *Maricopa County Medical Society* Recognizes the Propriety of a "Single Firm" Antitrust Analysis for Joint Ventures Such as the NFL.

In *Arizona* v. *Maricopa County Medical Society*,[5] this Court dealt with alleged price fixing activities of certain

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[3] 505 F. Supp. at 677-78, 689 (NFL Appendix B at 69a, 96a) (emphasis added).

[4] *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)).

[5] 50 U.S.L.W. 4687 (U.S. June 18, 1982) (No. 80-419).

foundations for medical care involving individual physicians "who compete with one another for patients." [6] These phyicians had not combined in order to sell any product or service different from those which the physicians offered severally. The Court contrasted the physicians' relationship in these foundations with that among members of organizations such as the American Society of Composers, Authors and Publishers ("ASCAP")[7] and, by implication, professional sports leagues:

> "The foundations are *not* analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. *In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.*" [8]

As *Maricopa* thus reaffirmed, § 1 of the Sherman Act calls for economic analysis of conduct—not formalistic evaluation of the structure—of multiple-member entities operating as partnerships or joint ventures. The relevant questions include:

—Are the sub-units separate "persons who would otherwise be competitors" of one another in producing and selling the product involved? [9]

—Do these component units operate with pooled assets and share "risks of loss" and opportunities for profit"? [10]

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[6] *Id.* at 4693.

[7] *See Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

[8] 50 U.S.L.W. at 4693 (emphasis added).

[9] *Id.*

[10] *Id.*

—Does the resulting entity act as a separate seller of a product (such as a "blanket license" to use copyrighted musical compositions) which is distinct from the products offered or which could be offered by the sub-units individually? [11]

As the District Court in this action[12] and other courts[13] have held, individual member clubs of a professional sports league for most purposes are not economic competitors of one another. The Court of Appeals' rejection of these precedents and its endorsement of a conflicting line of authority[14] has created divergence among the federal courts and contributed materially to the doctrinal confusion noted in the NFL's Petition.

The NFL clubs operate as separate "profit centers" within a single economic enterprise (as do, for example, regional offices of national accounting firms and law firms whose members practice as partners but may receive shares of the firm's profits computed on differing bases and subject to varying local costs). Differing club stadium arrangements and payrolls may result in non-uniform profit levels, but there can be no doubt that the teams' economic fate, like that of the members of any professional sports league, is virtually totally interdependent.[15] The teams jointly and

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[11] *Id.* & n.31 (quoting *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 22 (1979)).

[12] 505 F. Supp. at 691 (NFL Appendix B at 101a).

[13] *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978); *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974); *Levin* v. *National Basketball Association*, 385 F. Supp. 149, 150 (S.D.N.Y. 1974).

[14] *See, e.g., Los Angeles Memorial Coliseum Commission* v. *National Football League*, 519 F. Supp. 815 (C.D. Cal. 1981).

[15] *WTWV, Inc.* v. *National Football League*, 678 F.2d 142 (11th Cir. 1982).

collectively, as a league, own what are perhaps the NFL's most valuable assets, namely, its good will, reputation and fan allegiance; and their principal business decisions are made through a central governing body. The NFL also shares equally among the member teams its most important revenue sources: network television receipts are divided equally among the members, pre-season gate receipts from each game are shared on a 50/50 basis between opposing teams, and regular season gate receipts are divided on the basis of 60% for the home team and 40% for the visiting team.[16] The clubs also function with common filming, licensing and promotional operations.

The *league* produces the "product," which is uniquely high quality football presented in the format of a closely-balanced seasonal race. Television networks negotiate for, purchase and publicize the *league's* product,[17] and the *league's* Management Council bargains collectively with a single players' union. The profits of all clubs depend directly on the outcome of such negotiations with networks and players.

While the precise dollar amount of particular clubs' profits or losses may vary, the member teams (in the language of *Maricopa*) clearly "share risks of loss" and

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[16] 670 F.2d at 1251-52 (NFL Appendix A at 5a).

[17] The trial court in this action found that:

> "The networks . . . evaluate the strength of the sports league's generic product as a competitor in the market for television viewers and advertisers, adjust the terms offered to the leagues accordingly, and compile their individual rating and market share statistics on the basis of the *league* sports, *not* the *individual teams*. 505 F. Supp. at 679 (NFL Appendix B at 73a) (emphasis added).

"opportunities for profit." [18] The individual NFL clubs are not capable of acting separately as business competitors to sell "additional" NFL football games "on the side." Their situation therefore is even more closely related to the single firm economic model than was that of the individual artists who made up ASCAP.

The Court of Appeals disregarded the need for an examination of the economic basis of a professional sports league and instead treated the NFL's attempt to formulate legitimate conflict of interest rules as if the NFL were a mere industry "trade association," formed for the convenience of its 28 members, which excluded 26 NASL-affiliated competitors in the "industry." It ignored the existence and operation of a legitimate joint business with the right to compete as such and to command the exclusive loyalties of its members through rules ancillary to joint venture operations.

As a consequence, the Court of Appeals reached an astonishing conclusion: a professional sports league, in making production and marketing decisions and pursuing its own legitimate business interests, may not arrive at any internal agreements which are inconsistent with the business interests of its horizontal competitors. Neither the Rule of Reason nor any other antitrust principle countenances such a result.

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[18] The Court of Appeals ignored the NFL's overwhelmingly shared set of risks and opportunities and relied instead upon the mere existence of a few separate and incidental club revenue sources, such as local television (for pre-season games only) and radio income. 670 F.2d at 1252 (NFL Appendix A at 5a). These separate revenue sources amount to only 5 to 10 percent of total revenues. Compare the Trial Court's discussion at 505 F. Supp. 679-80 (NFL Appendix B at 74a).

III.

Application of Appropriate Antitrust Standards to Intra-Sports League Business Decision Making Is Not Equivalent to Sherman Act "Immunity."

The NASL's Brief in Opposition suggests repeatedly[19] that to adopt a Rule of Reason standard which would take into account the unique circumstances of enterprises such as professional sports leagues would be to grant antitrust "immunity" to such enterprises. This is incorrect.

The NFL submits that antitrust review of the business conduct of professional sports leagues ordinarily should begin with the "single firm" analysis suggested by *Maricopa*. But application of this doctrine is not the only manner in which this Court might resolve the conflicting and ill-reasoned sports law decisions which now abound. Even if NFL clubs were not a single enterprise, a Rule of Reason test could be formulated which would direct courts to weigh the conduct of professional sports leagues in light of whether that conduct is ancillary to legitimate *league* business goals. In any event, the issue is not "immunity."

In *National Society of Professional Engineers* v. *United States*,[20] this Court tested a restriction imposed by a trade association of competitors to see "whether the challenged agreement is one that promotes competition or one that suppresses competition."[21] In sports league cases, the federal courts have searched in vain for a way to apply this test in a rational fashion.[22] Since the member clubs of a

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[19] *See, e.g.*, Opp. at 3, 24, 27, 28.

[20] 435 U.S. 679 (1978).

[21] *Id.* at 691.

[22] *See, e.g., Neeld* v. *National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978). *Cf. Gunter Harz Sports, Inc.* v. *United States Tennis Association, Inc.*, 511 F. Supp. 1103 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981).

professional sports league normally are not separate competitors, many legitimate league pursuits yield effects which cannot logically be classified as either "pro-competitive" or "anti-competitive" in relation to any competition among the clubs. In the present case, a conflict of interest rule which would forbid interlocking ownership with a rival league is not designed to, and presents no prospect of, promoting competition among NFL clubs; yet strengthening the loyalty and commitment of NFL club owners to their joint enterprise necessarily will tend to improve the NFL's competitive market capabilities in relation to competing forms of entertainment. The Second Circuit took the *Professional Engineers* test entirely out of its logical context and inappropriately applied it to determine whether the NFL's rule promoted the economic well-being of a horizontal competitor league. This turns the Sherman Act on its head.

Properly viewed, the NFL's conflict of interest rules promote competition in the same way as does any other internal policy of a business organization which separates that entity and its sub-units from competitors in order to assure that decisions will be made independently. *Cf.* 15 U.S.C. §§ 18, 19. The Court of Appeals, like the courts involved in certain other sports league cases, simply ignored this basic consideration.

The term "immunity" is a red herring. Under a "single firm" analysis, sports leagues remain as much subject to the antitrust laws as do other single firms. And under a proper Rule of Reason standard, the NFL by-law provisions in issue here would be not only unobjectionable, but commendable.

IV.

There Are No Pending Legislative Matters Related to This Petition.

In spite of the gossip and misinformation contained in the various newspaper clippings appended to the NASL's Brief in Opposition, there is not now and never has been any pending legislation which would govern the issues presented by the NFL's Petition.

CONCLUSION

For the reasons set forth in the NFL's Petition and this Reply, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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